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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91164764
Party	Plaintiff Brink's Network, Incorporated
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Signature	/Alan S. Cooper/
Date	10/08/2008
Attachments	Reply Memorandum In Support of Opposer's Motion for Summary Judgment Dismissing Laches Defense.pdf (11 pages)(553867 bytes) Declaration of Kristin T. D'Andrea.pdf (36 pages)(978042 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

BRINK'S NETWORK, INCORPORATED)	
)	
Opposer)	
)	
v.)	Opposition No. 91164764
)	
THE BRINKMANN CORPORATION)	
)	
Applicant)	

REPLY MEMORANDUM IN SUPPORT OF OPPOSER'S MOTION
FOR SUMMARY JUDGMENT DISMISSING LACHES DEFENSE

I. INTRODUCTION

This matter is before the Board on Opposer's motion for partial summary judgment dismissing Applicant's laches defense. Applicant's Memorandum in opposition to that motion (hereinafter "Applicant's Opposing Memorandum") is predicated on a basic misunderstanding of the fundamental proposition that, in an opposition context, the time for measuring the alleged "delay" runs from the date when Opposer could first challenge registration -- not use -- of the mark BRINKMANN for home security systems and components.

For that reason and the others discussed below, summary judgment should be entered dismissing Applicant's laches defense.

II. ARGUMENT

A. APPLICANT'S "GENUINE ISSUES OF MATERIAL FACT" ARE NOT
FACTUAL AND/OR ARE NOT MATERIAL

1. Different Characterizations of the Record Do Not Rise to the Level of
Genuine Issues of Material Fact

Applicant apparently believes that the statement at pp. 2-3 of Opposer's Memorandum that the "principal" ground for opposition is likelihood of confusion somehow

creates a genuine issue of material fact because the Notice of Opposition also pleads likelihood of dilution. (Applicant's Opposing Memorandum, pp. 7-8.) However, because the adjective "principal" implicitly conveys the message that there is at least one other ground for opposition, namely, dilution, it is difficult to understand how this constitutes a genuine issue of "material fact."

2. Applicant's Purportedly Long Use of BRINKMANN Is Not Material to Laches in an Opposition Because Delay Is Not Measured from When Use of the Mark Commenced, But from When Registration Could First Be Contested

Applicant asserts there is a genuine issue of material fact arising out of the following "conflicting" portions of the record: (1) Opposer's reliance on Applicant's original response to Opposer's Interrogatory No. 22 setting forth the factual basis for the laches defense, and (2) the expanded factual basis for the laches defense in Applicant's supplemental response to Interrogatory No. 22 and Applicant's ownership of Registration Nos. 1,153,730 and 2,779,986 of the marks BRINKMANN (Stylized) and BRINKMANN BACKYARD KITCHEN, respectively. As discussed below, Applicant's position is unfounded.

Opposer's Interrogatory No. 22, served on September 6, 2005, inquired as to the factual basis for the laches defense. Applicant served its original response to Interrogatory No. 22 on October 11, 2005. Applicant's First Amended and Supplemental Responses to Opposer's First Set of Interrogatories, served on February 15, 2007, did not change or expand the original response to Interrogatory No. 22.¹ However, now faced with a motion for summary judgment directed to its laches defense, concurrent with its Opposing Memorandum Applicant served a Supplemental Response to Opposer's Interrogatory No. 22 which sets forth additional "facts" relating to, *inter alia*, use of the mark BRINKMANN

¹ A true copy of Applicant's response to Interrogatory No. 22, as set forth in Applicant's First Amended and Supplemental Responses to Opposer's First Set of Interrogatories, was attached as Appendix A to Opposer's Motion for Partial Summary Judgment Dismissing Applicant's Laches Defense.

in connection with “security products” of various types; use of the wording “Home Security” in advertising; and ownership of Registration Nos. 1,153,730 and 2,779,986.

Applicant should not be permitted to present such additional “evidence” in support of its laches defense well after a Rule 30(b)(6) deposition seeking such evidence was taken, when that additional “evidence” obviously was known to Applicant when that deposition was taken in February 2007, and its designated witness failed to provide such information at that time.² See *Rainey v. American Forest and Paper Ass’n, Inc.*, 26 F. Supp.2d 82, 94-95 (D.D.C. 1998) (defendant was not allowed to submit an affidavit in opposition to plaintiff’s summary judgment motion that contradicted the earlier testimony of its Rule 30(b)(6) witness when the new information was known or accessible at the time the deposition was taken).

But even apart from the procedural impropriety of Applicant’s reliance on the supplemental response to Interrogatory No. 22, its purported use of BRINKMANN for home security products since 1989 (or even earlier) is not material³ because the relevant date for

² Applicant’s Rule 30(b)(6) witness Helen Dunham testified on February 16, 2007, that Applicant was not aware of any evidence in support of its laches defense other than that set forth in the Answer to Interrogatory No. 22. (Dunham Dep., p. 67:17-21, a true copy of which was attached as Appendix B to Opposer’s Motion for Partial Summary Judgment Dismissing Applicant’s Laches Defense.) The contention at p. 9 of Applicant’s Opposing Memorandum that it is improper to question a Rule 30(b)(6) witness as to the factual basis for an affirmative defense is fundamentally flawed. Although a Rule 30(b)(6) deponent may not be questioned on matters falling within the attorney-client privilege and the work product doctrine, such a deponent may be questioned as to the factual bases for the positions taken by the party in question. See, e.g., *U.S. Equal Employment Opportunity Commission v. Caesars Entertainment, Inc.*, 237 F.R.D. 431, 433 (D. Nev. 2006); *Taylor v. Shaw*, 2007 710186 at ** 2-3 (D. Nev., March 7, 2007); *Pastrana v. Local 9505 Communications Workers of America*, 2007 WL 2900477 at *5 (S.D. Cal., Sept. 28, 2007). Moreover, Applicant was obligated to prepare Ms. Dunham to testify as to the subject matter areas specified in the Notice of Taking Deposition, including the factual basis for the laches defense. E.g., *Coleman v. Blockbuster, Inc.*, 238 F.R.D. 167 (E.D. Pa. 2006); *Bridgell v. Saint Gobain Abrasives, Inc.*, 233 F.R.D. 57 (D. Mass. 2005).

³ A “material” fact in a summary judgment context is one that might affect the disposition of such a motion, i.e., preclude summary disposition. E.g., *Anderson Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Ryste & Ricas, Inc. v. Harvey*, 477 F.3d 1337, 1340 (Fed Cir. 2007); *Opryland USA Inc. v. Great American Music Show, Inc.*, 970 F.2d 847, 849-50 (Fed. Cir. 1992). In a laches context in an opposition proceeding, the relevant material fact for purposes of determining the length of the “delay” is when the opposed application was published for opposition.

measuring delay is not when actual use of the mark commenced or when the opposer knew or should have known of such use. Rather, the undisputed material fact is when the opposed application was published for opposition. *Lincoln Logs Ltd. v. Lincoln Pre-Cut Log Homes, Inc.*, 971 F.2d 732 (Fed. Cir. 1992); *National Cable Television Ass'n, Inc. v. American Cinema Editors, Inc.*, 937 F.2d 1572 (Fed. Cir. 1991).

Applicant's reliance on Registration Nos. 1,153,730 and 2,79,986 as somehow creating a genuine issue of material fact also is misplaced because, as demonstrated below, the goods listed in those registrations do not cover home security systems or components therefor as defined in Applicant's response to Opposer's Interrogatory No. 6.

Ms. Dunham testified that the seven items listed in the response to Opposer's Interrogatory No. 6 are an accurate identification of all of the products covered by the descriptive language "home security systems and components therefor" as used in the opposed application. (Dunham Dep., pp. 19:23-21:15.⁴) Ms. Dunham also testified that certain items in the description of goods in Registration No. 1,153,730 of the mark BRINKMANN did not fall within the home security systems and components therefor identified in Applicant's answer to Interrogatory No. 6. (*Id.*, pp. 28:21-32:8 and Ex. 6⁵.) Finally, Ms. Dunham testified that there are no other registrations of BRINKMANN that cover home security products. (*Id.*, p. 35:2-16.⁶) As a Rule 30(b)(6) witness, Ms. Dunham is required to testify as to the information reasonably available to Applicant and her testimony

⁴ A true copy of Dunham Dep. pp. 19:23-21:15 is annexed as Appendix A to the Declaration of Kristin D'Andrea in Support of Opposer's Motion for Partial Summary Judgment (hereinafter "D'Andrea Dec.") submitted herewith.

⁵ True copies of Dunham Deposition pp. 28:21-32:8 and Ex. 6 are annexed to the D'Andrea Dec. as Appendices B and C, respectively. The specific items listed in Registration No. 1,153,730 that do not comprise home security systems and components therefor are electrical extension cords, radar detectors, electronic metal detectors, head phones and search coils, and electronic connectors for use in connection with electronic metal detectors.

⁶ A true copy of Dunham Dep., p. 35:2-16 is annexed to the D'Andrea Dec. as Appendix D.

is binding on Applicant. See, e.g., *Poole ex rel. Elliott v. Textron, Inc.*, 192 F.R.D. 494, 504 (D. Md. 2000); *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996).

Ms. Dunham's admissions that Registration No. 1,153,730 does not cover home security systems and components therefor as specified in the answer to Interrogatory No. 6 and that Applicant does not have any other registrations of BRINKMANN that cover home security products were not challenged, explained, limited or corrected in any respect on cross-examination by Applicant's counsel. (Dunham Dep., p. 70:14-16.⁷)

B. APPLICANT FAILED TO ADDRESS THE ISSUE OF WHEN DILUTION BECAME A COGNIZABLE GROUND FOR OPPOSITION AND ITS IMPACT ON THE UNREASONABLE DELAY ELEMENT OF ITS LACHES DEFENSE

Applicant's argument that laches bars Opposer's dilution claim conveniently ignores the fact that § 43(c) was not a cognizable ground for opposition until the Trademark Amendments Act of 1999⁸ (hereinafter the "TAA") was enacted. The TAA specifically provides that a dilution claim can be asserted in an opposition only if the opposed application was filed after the January 16, 1996 effective date of the Federal Trademark Dilution Act, 15 U.S.C. § 43(c). See *Polaris Industries, Inc. v. DC Comics*, 59 USPQ2d 1798 (TTAB 2000); *Boral Ltd. v. FMC Corp.*, 59 USPQ2d 1701 (TTAB 2000). Additionally, it is well settled that an alleged violation of a state dilution statute is not a cognizable ground for contesting registration in an *inter partes* proceeding before the Board. See e.g., *Enterprises Rent-A-Car Co. v. Advantage Rent-A-Car, Inc.*, 330 F.3d 1333 (Fed. Cir. 2003), *reh'g en banc denied*, (July 9, 2003), *cert. denied*, 540 U.S. 1089 (2003); *K2 Corp. v. Philip Morris Inc.*, 192 USPQ 174, 177 (TTAB 1976), *aff'd*, 555 F.2d 815 (CCPA 1977); *Dickel Co. v. General Mills, Inc.*, 317 F.2d 954 (CCPA 1963).

Thus, contrary to Applicant's argument, Opposer could not have challenged Registration No. 1,153,730 on § 43(c) dilution grounds because that registration issued on

⁷ A true copy of Dunham Dep. p. 70:14-16 is annexed to the D'Andrea Dec. as Appendix E.

⁸ Pub. L. 106-43, 113 Stat. 219 (Aug. 5, 1999).

May 21, 1981, long prior to January 16, 1996. Nor could Registration No. 1,153,730 have ever been challenged on state dilution grounds.

Applicant's reliance on Registration No. 2,779,986 of the mark BRINKMANN BACKYARD KITCHEN, which covers combined outdoor grill and kitchen appliance units comprised of gas grills, sinks and coolers, also is misplaced. As a result of the TAA, the earliest point at which Opposer could have challenged Applicant's right to register that mark on § 43(c) grounds would have been October 22, 2002, when the application that matured into Registration No. 2,779,986 was published for opposition. Thus, the period of any "delay" is roughly thirty (30) months; viz., from October 22, 2002, when the application in question was published until April 1, 2005, when the present opposition was commenced. A "delay" of that magnitude generally does not rise to the level of laches in an opposition or cancellation proceeding. See, e.g., *Plymouth Cordage Co. v. Solar Nitrogen Chemicals, Inc.*, 152 USPQ 202 (TTAB 1966) (delay of three years insufficient to constitute laches).

Applicant also argues that Opposer is guilty of laches because it has had constructive notice of Applicant's use of the mark BRINKMANN since 1981 by virtue of Registration No. 1,153,730. However, the only constructive notice effect flowing from that registration arises under § 22 of the Federal Trademark Act which provides that the issuance of a registration on the Principal Register is constructive notice of the registrant's claim of ownership -- not use -- of the mark which is the subject of that registration.

Although laches can be asserted against a § 43(c) dilution claim in an opposition proceeding as indicated in *Hornsby v. TJX Companies Inc.*, 87 USPQ2d 1411, 1419 (TTAB 2008), the question of what constitutes unreasonable delay with respect to such a claim apparently has not yet been addressed by the Board. Opposer respectfully submits that the Board should adopt the conceptual approach followed by a clear majority of the U.S. Circuit Courts of Appeals in a trademark infringement and unfair competition context of

using the relevant statute of limitations to measure the reasonableness of the delay.⁹ Because there is no statute of limitations with respect to §§ 32 and 43(a) claims, these courts look to the analogous state statute of limitations to measure the reasonableness of the alleged delay and hold that a delay of less than the analogous statute of limitations is presumptively reasonable.

However, in a § 43(c) context, there is no need to search for an analogous state statute of limitations because 28 U.S.C.A. § 1658, which was enacted on December 1, 1990, creates a federal statute of limitations applicable to § 43(c):

“Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of enactment of this section may not be commenced later than 4 years after the cause of action accrues.”

This four-year “catch all” federal statute of limitations applies to any cause of action arising under a federal law enacted after December 1, 1990. *Jones v. R.R. Donnelley*, 541 U.S. 369 (2004). The § 1658 statute of limitations accordingly is applicable to dilution claims because the January 16, 1996 effective date of § 43(c) is obviously well after December 1, 1990. T.J. McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 24:130 (2008). Consistent with the Circuit decisions cited above, the controlling § 1658 four-year statute of limitations should be used to measure the reasonableness of the alleged “delay” in the present laches context. As the 30-month “delay” in this instance is less than four years, it is presumptively reasonable.

⁹ This approach has been followed in the Second, Third, Fourth, Sixth, Seventh, Ninth and Eleventh Circuits and by a number of District Courts in other Circuits. *E.g.*, *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829 (9th Cir. 2002); *Chattanooga Manufacturing Co. v. Nike, Inc.*, 301 F.3d 789 (7th Cir. 2002); *Lyons Partnership, L.P. v. Morris Costumes*, 243 F.3d 789 (4th Cir. 2001); *Kason Industries, Inc. v. Component Hardware Group, Inc.*, 120 F.3d 1199 (11th Cir. 1997); *Beauty Time, Inc. v. VU Skin Systems, Inc.*, 118 F.3d 140 (3d Cir. 1997); *Conopco, Inc. v. Campbell Soup Co.*, 95 F.3d 187 (2d Cir. 1996). *Tandy Corp. v. Malone & Hyde, Inc.*, 769 F.2d 362 (6th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986); *Icon Health & Fitness, Inc. v. Nautilus Group, Inc.*, No. 1:02cv00109tc, 2005 U.S. Dist. LEXIS 39765 (D. Utah, Oct. 24, 2005); *Minnesota Mining and Manufacturing Co. v. Beautone Specialties*, 82 F. Supp.2d 997 (D. Minn. 2000); *Derrick Manufacturing Corp. v. Southwestern Wire Cloth, Inc.*, 934 F. Supp. 796 (S.D. Tex. 1996); *Kusek v. The Family Circle, Inc.*, 894 F. Supp. 522 (D. Mass. 1995).

C. THE *MOREHOUSE* DEFENSE IS INAPPLICABLE

Relying on *Morehouse Mfg. Corp. v. J. Strickland & Co.*, 407 F.2d 881 (CCPA 1969), Applicant argues that a laches defense may be based on the opposer's failure to object to the applicant's prior registration of substantially the same mark for substantially the same goods or services. However, the *Morehouse* defense is not applicable here because the record establishes that Applicant does not own a registration of BRINKMANN, or any other substantially similar mark, that covers the home security systems and components therefor at issue in this proceeding or any substantially similar goods.

Applicant's response to Opposer's Interrogatory No. 6 identified seven products that comprise "home security systems and components therefor" as described in the opposed application.¹⁰ Ms. Dunham confirmed that these seven items are an accurate identification of all of the products that are included in the descriptive language "home security systems and components therefor" set forth in the opposed application. (Dunham Dep., pp. 19:23-21:15.¹¹) Ms. Dunham testified that none of the goods covered by Registration No. 1,153,730 fall within "home security systems and components therefor" as identified in the response to Opposer's Interrogatory No. 6. (*Id.*, pp. 28:21-32:8 and Ex. 6¹².) Ms. Dunham also testified that she was not aware of any other registrations of BRINKMANN that cover home security products. (*Id.*, p. 35:2-16.¹³) As a Rule 30(b)(6) witness, Ms. Dunham was required to testify as to the information reasonably available to

¹⁰ A true copy of Applicant's response to Opposer's Interrogatory No. 6 (Exhibit 2 to the Dunham deposition transcript) listing these seven products is attached as Appendix F to the D'Andrea Dec. The same response to Interrogatory No. 6 was stated in Applicant's First Amended Answers to Opposer's First Set of Interrogatories (Exhibit 1 to the Dunham deposition), a true copy of which is annexed to the D'Andrea Dec. as Appendix G.

¹¹ See D'Andrea Dec. Appendix A.

¹² See D'Andrea Dec. Appendices B and C.

¹³ See D'Andrea Dec. Appendix D.

Applicant and her testimony is binding on Applicant. See, e.g., *Poole ex rel. Elliott v. Textron, Inc.*, *supra*; *United States v. Taylor*, 166 F.R.D. at 361.

Ms. Dunham's admissions that Registration No. 1,153,730 does not cover home security systems and components therefor and that Applicant does not have any other registrations of BRINKMANN that cover home security products and components therefor was not challenged, explained, limited or corrected in any respect on cross-examination by Applicant's counsel. (Dunham Dep., p. 70:14-16.¹⁴) That binding testimony accordingly precludes any legitimate reliance on a *Morehouse* defense because it is uncontested that: (1) Registration No. 1,153,730 does not cover the same products or substantially the same products as the home security systems and components therefor described in the opposed application, and (2) Applicant does not own any other registrations of BRINKMANN that cover such goods. Indeed, Ms. Dunham testified that the very reason that Applicant filed the opposed application is that Registration No. 1,153,730 did not cover all of the products on which the mark BRINKMANN was used. (*Id.*, pp. 37:9-38:11.¹⁵)

D. APPLICANT'S ARGUMENTS BASED ON OPPOSER'S "FAILURE" TO CONTEST APPLICANT'S REGISTRATION OF BRINKMANN FOR GOODS OTHER THAN HOME SECURITY SYSTEMS AND COMPONENTS THEREFOR ARE MISPLACED

Applicant Opposition Memorandum, pp. 16-17, argues that laches bars the § 43(c) dilution claim because Opposer did not object to registration of the mark BRINKMANN for over 30 years and now is only challenging registration for certain of the goods in the opposed application. However, as noted above, a fundamental flaw in this argument is that until the enactment of the TAA an opposition or cancellation proceeding could not be based on a federal dilution claim, nor could such a claim ever be based on a state dilution statute. Accordingly, the unreasonable delay argument based on Opposer's alleged failure to

¹⁴ See D'Andrea Dec. Appendix E.

¹⁵ A true copy of Dunham Dep. pp. 37:9-38:11 is attached as Appendix H to the D'Andrea Dec.

contest Applicant's earlier registrations of BRINKMANN for goods other than home security systems and components therefor on dilution grounds is unfounded as a matter of law.

Applicant also argues that dilution is precluded by Opposer's failure to challenge registration of BRINKMANN for goods other than those at issue in this proceeding. However, that argument goes to the merits of the dilution claim, and not to laches. An affirmative defense by definition concedes that the plaintiff has made a *prima facie* showing, but seeks to avoid liability based on matters going beyond that *prima facie* showing, namely, in the case of laches some unreasonable delay and prejudicial reliance on such delay.¹⁶ Accordingly, arguments directed to the merits of Opposer's dilution claim are inappropriate in a laches affirmative defense context.

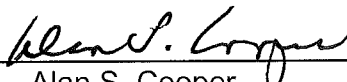
IV. CONCLUSION

For the reasons stated above and in Opposer's principal Memorandum, summary judgment dismissing Applicant's laches defense should be granted.

BRINK'S NETWORK, INCORPORATED

Date: October 8, 2008

By: _____


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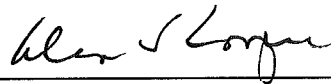
Attorneys for Opposer

¹⁶ See, e.g., Wright & Miller, *Federal Practice and Procedure*, § 1270 n. 2; *Ford Motor Co. v. Transport Indemnity Co.*, 795 F.2d 538, 546 (6th Cir.1986) (an affirmative defense raises matters extraneous to the plaintiff's *prima facie* case); *Gwin v. Curry*, 161 F.R.D. 70, 71 (N.D. Ill. 1995) (an affirmative defense accepts rather than contradicts the well-pleaded allegations in the complaint); *Federal Deposit Ins. Corp. v. Hurdman*, 655 F. Supp. 259, 262 (E.D. Cal. 1987) (affirmative defenses plead matters extraneous to the plaintiff's *prima facie* case which deny the plaintiff's right to recover even if the allegations of the complaint are true).

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Reply Memorandum in Support Of Opposer's Motion for Partial Summary Judgment Dismissing Applicant's Laches Defense was served on the following counsel of record for Applicant by Federal Express, with confirming service by depositing the same in the U.S. Mail, first class mail postage prepaid, this 8th day of October, 2008:

Gary A. Clark, Esq.
Susan Hwang, Esq.
Sheppard, Mullin, Richter & Hampton LLP
333 South Hope Street, 48th Floor
Los Angeles, California 90071



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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BRINK'S NETWORK, INCORPORATED)	
)	
Opposer)	
)	
v.)	Opposition No. 91164764
)	
THE BRINKMANN CORPORATION)	
)	
Applicant)	

DECLARATION OF KRISTIN T. D'ANDREA IN
SUPPORT OF OPPOSER'S MOTION FOR
PARTIAL SUMMARY JUDGMENT DISMISSING
APPLICANT'S LACHES DEFENSE

KRISTIN T. D'ANDREA declares as follows:

(1) I am a Litigation Case Manager employed by Howrey LLP, counsel for Opposer Brink's Network, Incorporated, in the above-referenced opposition proceeding and have responsibility for maintaining the files in connection with that proceeding. The facts set forth below are based on my personal knowledge and, if called as a witness, I could and would testify competently with respect to these facts.

(2) Attached hereto as Appendix A is a true copy of pp. 19-21 of the deposition of Helen Dunham, Applicant's Rule 30(b)(6) witness, taken on February 16, 2007 (hereinafter "Dunham Dep.").

(3) Attached hereto as Appendix B is a true copy of Dunham Dep. pp. 28-32.

(4) Attached hereto as Appendix C is a true copy of Dunham Dep. Ex. 6.

(5) Attached hereto as Appendix D is a true copy of Dunham Dep. p. 35.

(6) Attached hereto as Appendix E is a true copy of Dunham Dep. p. 70.

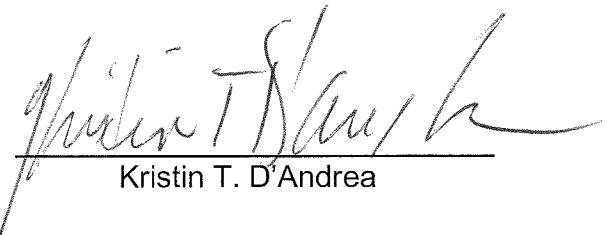
(7) Attached hereto as Appendix F is a true copy of Applicant's original response to Opposer's Interrogatory No. 6 which was marked as Dunham Dep. Ex. 2.

(9) Attached hereto as Appendix G is a true copy of Applicant's response to Opposer's Interrogatory No. 6 as set forth in Applicant's First Amended and Supplemental Responses to Opposer's First Set of Interrogatories which was marked as Dunham Dep. Ex. 1.

(10) Attached hereto as Appendix H is a true copy of Dunham Dep. pp. 37-38.

In accordance with 28 U.S.S. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

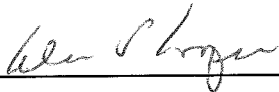
Executed at Washington, D.C., this 8th day of October, 2008.


Kristin T. D'Andrea

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Declaration of Kristin T. D'Andrea in Support Of Opposer's Motion for Partial Summary Judgment Dismissing Applicant's Laches Defense was served on the following counsel of record for Applicant by Federal Express, with confirming service by depositing the same in the U.S. Mail, first class mail postage prepaid, this 8th day of October, 2008:

Gary Clark, Esq.
Susan Hwang, Esq.
Sheppard, Mullin, Richter & Hampton LLP
333 South Hope Street, 48th Floor
Los Angeles, California 90071



APPENDIX A

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE
THE TRADEMARK TRIAL AND APPEAL BOARD

BRINK'S NETWORK
INCORPORATED,

Opposer,

VS.

THE BRINKMANN CORPORATION

Applicant.

Certified Copy

Opposition No. 91164764

ORAL DEPOSITION OF

HELEN DUNHAM

FEBRUARY 16, 2007

VOLUME I

ORAL DEPOSITION OF HELEN DUNHAM, produced as
a witness at the instance of the Opposer, and duly
sworn, was taken in the above-styled and numbered cause
on the 16th day of February, 2007, from 9:03 a.m. to
10:57 a.m., before Stacey R. Cruz, CSR in and for the
State of Texas, reported by machine shorthand, at the
offices of Carrington Coleman, Sloman & Blumenthal,
located at 901 Main Street, Dallas, Texas, in accordance
with the Federal Rules of Civil Procedure and the
provisions stated on the record or attached hereto.

1 MR. COOPER: Mr. Clark, I assume that if any
2 additional information would have been uncovered that
3 related to interrogatory number 1, it would have been
4 included in what was served yesterday?

5 MR. CLARK: Correct, counsel.

6 MR. COOPER:: Which is Exhibit 1.

7 Q. (BY MR. COOPER) Ms. Dunham-- I don't think
8 Mr. Clark will disagree with me, but in this opposition
9 proceeding shortly after the notice of opposition was
10 filed, Brinkmann Corporation amended the home security
11 part of the description -- home security products part of
12 the description in the opposed application, and it now
13 reads as, quote, Home security systems and components
14 therefore; namely, motion-sensitive home security lights,
15 detectors, receivers, transmitters and wall-mount
16 brackets.

17 A. Okay.

18 Q. Closed quotes.

19 Okay. In that context, the wall-mount
20 brackets are wall-mount brackets for home security
21 products, correct?

22 A. Correct.

23 Q. Okay. Would you please look at interrogatory
24 number 6 in Exhibit 2?

25 A. (Witness complies.)

1 Q. There is a listing there that's about two-thirds
2 down the page of the products offered under the mark
3 "Brinkmann" that are included in the description, quote
4 Home security systems and components therefore. Do you
5 see that?

6 A. Yes.

7 Q. There are one, two, three, four, five, six, seven
8 products, correct?

9 A. One, two, three, four, five, six.

10 Q. Let me read them.

11 A. Okay.

12 Q. The first is home security solar motion-activated
13 lighting system --

14 A. Okay.

15 Q. -- and all components thereof, correct?

16 A. Yes.

17 Q. The next is solar home security SL-7 motion
18 detector, correct?

19 A. Yes.

20 Q. The next is solar home security SL-8 motion
21 director, correct?

22 A. Okay. Yes.

23 Q. And the next is home security halogen motion
24 detector, correct?

25 A. Yes.

1 Q. And the next is home security 110-degree motion
2 detector, correct?

3 A. Yes.

4 Q. And the next is home security 180-degree motion
5 detector, correct?

6 A. Yes.

7 Q. And the last is home security wireless security
8 system and all components thereof, correct?

9 A. Yes.

10 Q. And since the answer to the interrogatories are
11 not verified, can I ask you, please, to confirm that this
12 is an accurate statement with respect to the products
13 that are included in the description "home security
14 systems and components therefore"?

15 A. Yes.

16 MR. COOPER: Let me ask the reporter to mark
17 as Dunham Deposition Exhibit 3 a document produced by
18 Brinkmann Corporation bearing production No. BM 01702.

19 (Exhibit Number 3 marked.)

20 Q. (BY MR. COOPER) Ms. Dunham, would you please look
21 at Exhibit 3.

22 A. Yes.

23 Q. Do you recognize that?

24 A. Yes.

25 Q. This is a -- packaging for a Brinkmann home

APPENDIX B

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE
THE TRADEMARK TRIAL AND APPEAL BOARD

BRINK'S NETWORK)

INCORPORATED,)

Certified Copy

Opposer,)

VS.)

Opposition No. 91164764

THE BRINKMANN CORPORATION)

Applicant.)

ORAL DEPOSITION OF

HELEN DUNHAM

FEBRUARY 16, 2007

VOLUME I

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offices of Carrington Coleman, Sloman & Blumenthal,
located at 901 Main Street, Dallas, Texas, in accordance
with the Federal Rules of Civil Procedure and the
provisions stated on the record or attached hereto.

1 blank spot in the deposition transcript here and ask you,
2 after the deposition is over, to confirm that "Brinkmann"
3 is used as a trademark on labels or tags affixed to the
4 components and so indicate in that blank space; is that
5 agreeable?

6 MR. CLARK: Well, except that the question, I
7 think, is a little unclear. You're asking as to every
8 product in the home security --

9 MR. COOPER: Generally. Or labels or tags
10 generally used on the various home security products so
11 we have trademark use on the product as well as on
12 packaging.

13 MR. CLARK: All right. So long as it's
14 understood --

15 MR. COOPER: General.

16 MR. CLARK: -- the answer doesn't require it
17 on every product.

18 MR. COOPER: Of course. Of course.

19 A. _____
20 _____

21 MR. COOPER: I've asked the reporter to mark
22 as Exhibit 6, Dunham Exhibit 6, a copy of registration
23 number 1153730, which was produced as document BM 001706.

24 (Exhibit Number 6 was marked.)

25 Q. (BY MR. COOPER) Ms. Dunham, do you recognize

1 Exhibit 6?

2 A. Yes.

3 Q. Now, this registration issued on May 12, 1981. Is
4 that what it shows?

5 A. Yes.

6 Q. Okay. That was before you began your employment
7 with Brinkmann Corporation?

8 A. Yes.

9 Q. Okay. If you would look, please, in about the
10 middle of the page on the right-hand side after the word
11 "for," it has, quote, Electrical extension cords,
12 brackets, radar detectors, semicolon, and electronic
13 metal detectors, headphones and search coils and
14 electrical connectors for use therewith. Do you see
15 that?

16 A. Yes.

17 Q. Okay. Some of the wording here specifically
18 "radar detectors and electronic metal detectors,
19 headphones and search coils" has been lined through. Do
20 you see that?

21 A. Yes.

22 Q. What does that mean?

23 A. I don't know what that means.

24 MR. COOPER: Mr. Clark, can we agree that
25 what this means is, is that when this registration was

1 renewed in 2001, these goods were deleted? The
2 lined-through goods?

3 MR. CLARK: Well, I'm -- the record will
4 speak for itself on the renewal. I believe you're right
5 about that, whether the lined-through is -- relates to
6 that, I don't know.

7 MR. COOPER: Okay.

8 MR. CLARK: I -- I don't know what that
9 means.

10 MR. COOPER: But I think if you looked at a
11 copy of the registration as it appears on the US Patent
12 and Trademark Office website, you would see that radar
13 detectors and electronic metal detectors, headphones and
14 search coils are within brackets.

15 MR. CLARK: Right.

16 MR. COOPER: That generally means that those
17 goods have been deleted in the renewal, correct?

18 MR. CLARK: I agree with that.

19 MR. COOPER: Okay.

20 Q. (BY MR. COOPER) Okay. Now, electrical extension
21 cords are not among the list of home security products
22 listed in interrogatory number 6; is that correct?

23 A. No.

24 Q. It's not correct?

25 A. I'm sorry.

1 Q. Let me try to ask the question again.

2 A. I'm sorry.

3 Q. We have the agreed list of home security systems
4 and components listed in the answer to interrogatory
5 number 6 on page 8 of Exhibit 2, correct?

6 A. Yes.

7 MR. CLARK: Why don't you look --

8 Q. (BY MR. COOPER) Look at that, please.

9 A. Okay.

10 Q. Electrical extension cords are not among those
11 items, correct?

12 A. Well, there are -- there is an electric cord that
13 goes from some of these products.

14 Q. An electric extension cord is a cord that is used
15 in a home or an office so that you can attach a -- some
16 sort of an electrical device to a electrical outlet that
17 is too far away for the cord, from the device, to reach;
18 is that correct?

19 A. Yes.

20 Q. Okay.

21 A. So, no, it's not.

22 Q. Right. And radar detectors are not among the
23 items listed in the answer to interrogatory number 6,
24 correct?

25 A. Yes.

1 Q. And electronic metal detectors, headphones and
2 search coils are not among the items listed in the answer
3 to interrogatory number 6, correct?

4 A. Right.

5 Q. And electric connectors for use in connection with
6 electronic metal detectors are not listed in
7 interrogatory number 6, correct?

8 A. Correct.

9 Q. Okay.

10 MR. COOPER: I asked the reporter to mark as
11 Dunham Deposition Exhibit 7 a copy of a -- an item that I
12 will represent, Mr. Clark, was one of the specimens found
13 in the file history or registration number 1153730.

14 (Exhibit Number 7 was marked.)

15 Q. (BY MR. COOPER) Ms. Dunham, do you recognize
16 Exhibit 7?

17 A. Yes.

18 Q. This is a counter display for the Q-beam portable
19 electric spotlight; is that correct?

20 A. Yes.

21 Q. And do you recognize that product?

22 A. Yes.

23 Q. And this shows a -- it says it has a cigarette
24 lighter receptacle; is that correct?

25 MR. COOPER: Excuse me one second, please.

APPENDIX C

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE
THE TRADEMARK TRIAL AND APPEAL BOARD

BRINK'S NETWORK)

INCORPORATED,)

Certified Copy

Opposer,)

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Opposition No. 91164764

THE BRINKMANN CORPORATION)

Applicant.)

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provisions stated on the record or attached hereto.

at. Cls.: 9 and 11

Prior U.S. Cls.: 21, 26 and 34

Reg. No. 1,153,730

Registered May 12, 1981

United States Patent and Trademark Office

TRADEMARK
Principal Register

BRINKMANN

The Brinkmann Corporation (Texas corporation)
4215 McEwen Rd.
Dallas, Tex. 75240

For: ELECTRICAL EXTENSION CORDS,
BRACKETS, RADAR ~~DETECTORS~~, AND
ELECTRONIC ~~METAL DETECTORS~~, HEAD-
PHONES AND SEARCH COILS, AND ELEC-
TRIC CONNECTORS FOR USE THEREWITH, in
CLASS 9 (U.S. Cls. 21 and 26).

First use Jun. 12, 1978; in commerce Jun. 12, 1978.

For: CHARCOAL FIRED AND ELECTRIC
ROASTING, GRILLING AND BARBECUE
COOKERS FOR DOMESTIC USE AND PORTA-
BLE ELECTRIC LIGHTS AND FILTERS, AND
REPLACEMENT LAMPS, in CLASS 11 (U.S. Cls.
21 and 34).

First use Aug. 24, 1978; in commerce Aug. 24,
1978.

Ser. No. 193,053, filed Nov. 13, 1978.

ABRAM I. SACHS, Primary Examiner

Δ π EXHIBIT <u>6</u>
Deponent _____
Date _____ Rptr. _____
WWW.DEPOBOOK.COM

BM 001706

APPENDIX D

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE
THE TRADEMARK TRIAL AND APPEAL BOARD

BRINK'S NETWORK)

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with the Federal Rules of Civil Procedure and the
provisions stated on the record or attached hereto.

1 A. No.

2 Q. Are you aware of any registrations of the
3 trademark "Brinkmann" for the home security products that
4 are listed -- cover the home security products listed in
5 the answer to interrogatory number 6 in Exhibit 2?

6 A. I'm sorry. Can you repeat that, please?

7 Q. Okay. One of the areas that we are asking about
8 in the deposition is prior registrations that Brinkmann
9 Corporation owns that purportedly cover home security
10 products. The one that was produced is the registration
11 which has been marked as Exhibit Number 6.

12 A. Okay.

13 Q. My question to you is: Are you aware of any other
14 registrations of Brinkmann that purportedly cover home
15 security products?

16 A. No.

17 MR. COOPER: All right. I asked the reporter
18 to mark as Dunham Deposition Exhibit 9 a copy of the file
19 history of application serial number 76483115, which is
20 the application involved in this opposition proceeding.

21 (Exhibit Number 9 was marked.)

22 Q. (BY MR. COOPER) Ms. Dunham, do you recognize
23 Exhibit Number 9?

24 A. No.

25 Q. Well, I'm going to be asking you some questions

APPENDIX E

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE
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BRINK'S NETWORK)

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provisions stated on the record or attached hereto.

1 them support the latches defense, counsel, but certainly
2 the sales history documents and the advertising documents
3 support the position that Brinks should have known about
4 Brinkmann and its home security systems and they also
5 support the prejudice, the continued investment, in those
6 products and the use of the "Brinkmann" mark in those
7 products.

8 MR. COOPER:: Well, this is not a question,
9 but I think we probably will be moving for summary
10 judgment and dismissing the latches defense, and we'll
11 test some of these points in that context. Give me just
12 a minute, please. Go off the record.

13 (Break taken.)

14 MR. COOPER: I have no further questions
15 under direct examination.

16 MR. CLARK: I have no questions.

17 (Proceedings concluded.)
18
19
20
21
22
23
24
25

APPENDIX F

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE
THE TRADEMARK TRIAL AND APPEAL BOARD

BRINK'S NETWORK)

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

BRINK'S NETWORK, INCORPORATED,

Opposer,

v.

THE BRINKMANN CORPORATION,

Applicant.

Opposition No. 91164764

APPLICANT BRINKMANN'S RESPONSES TO OPPOSER BRINK'S
NETWORK'S FIRST SET OF INTERROGATORIES

Pursuant to FED. R. CIV. P. 33 and 37 C.F.R. § 2.120, Applicant The Brinkmann Corporation ("Brinkmann") hereby responds to OPPOSER BRINK'S NETWORK, INCORPORATED'S FIRST SET OF INTERROGATORIES served by Opposer Brink's Network, Incorporated ("Brink's Network") by mail on September 6, 2005.

GENERAL OBJECTIONS

1. Brinkmann objects to each interrogatory insofar as it is vague, overly broad, oppressive, harassing or vexatious; imposes burden or expense that outweighs its likely benefit; seeks a legal conclusion; and/or seeks information not relevant to the claim or defense of any party.

Δ π EXHIBIT <u>2</u>
Deponent _____
Date _____ Rptr. _____
WWW.DEPOBOOK.COM

APPLICANT'S RESPONSES TO OPPOSER'S
FIRST SET OF INTERROGATORIES

discuss Brink's Network's filing of the first request for extension of time to file the Notice of Opposition.

Brinkmann reserves the right to amend and/or supplement this response as its investigations and discovery progress.

INTERROGATORY NO. 6:

Identify with specificity all goods Applicant provides under the mark BRINKMANN which Applicant believes to be included in the description "home security systems and components therefor."

RESPONSE TO INTERROGATORY NO. 6:

Subject to and without waiving the General Objections, which are incorporated by reference, Brinkmann provides the following response:

Brinkmann considers the following products offered under the mark BRINKMANN to be included in the description "home security systems and components therefor":

- Home Security Solar Motion Activated Lighting System, and all components thereof
- Solar Home Security SL-7 Motion Detector
- Solar Home Security SL-8 Motion Detector
- Home Security Halogen Motion Detector
- Home Security 110° Motion Detector
- Home Security 180° Motion Detector
- Home Security Wireless Security System, and all components thereof

Brinkmann offers replacement lamps for these products.

APPENDIX G

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE
THE TRADEMARK TRIAL AND APPEAL BOARD

BRINK'S NETWORK)

INCORPORATED,)

Certified Copy

Opposer,)

VS.)

Opposition No. 91164764

THE BRINKMANN CORPORATION)

Applicant.)

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provisions stated on the record or attached hereto.

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

BRINK'S NETWORK, INCORPORATED,

Opposer,

v.

THE BRINKMANN CORPORATION,

Applicant.

Opposition No. 91164764

**APPLICANT BRINKMANN'S FIRST AMENDED AND SUPPLEMENTAL
RESPONSES TO OPPOSER BRINK'S NETWORK'S FIRST SET OF
INTERROGATORIES**

Pursuant to FED. R. CIV. P. 33, Applicant The Brinkmann Corporation ("Brinkmann") hereby amends and supplements its responses to OPPOSER BRINK'S NETWORK, INCORPORATED'S FIRST SET OF INTERROGATORIES served by Opposer Brink's Network, Incorporated ("Brink's Network") by mail on September 6, 2005.

GENERAL OBJECTIONS

1. Brinkmann objects to each interrogatory insofar as it is vague, overly broad, oppressive, harassing or vexatious; imposes burden or expense that outweighs its likely benefit; seeks a legal conclusion; and/or seeks information not relevant to the claim or defense of any party.

Δ π EXHIBIT 1
Deponent H. DUNHAM
Date 2.14.07 Rptr. S.C.
WWW.DEPOBOOK.COM

discuss Brink's Network's filing of the first request for extension of time to file the Notice of Opposition.

Brinkmann reserves the right to amend and/or supplement this response as its investigations and discovery progress.

INTERROGATORY NO. 6:

Identify with specificity all goods Applicant provides under the mark BRINKMANN which Applicant believes to be included in the description "home security systems and components therefor."

RESPONSE TO INTERROGATORY NO. 6:

Subject to and without waiving the General Objections, which are incorporated by reference, Brinkmann provides the following response:

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- Home Security Solar Motion Activated Lighting System, and all components thereof
- Solar Home Security SL-7 Motion Detector
- Solar Home Security SL-8 Motion Detector
- Home Security Halogen Motion Detector
- Home Security 110° Motion Detector
- Home Security 180° Motion Detector
- Home Security Wireless Security System, and all components thereof

Brinkmann offers replacement lamps for these products.

APPENDIX H

1 Q. Is she still with the company?

2 A. No.

3 Q. Do you know where she is now?

4 A. No, I don't.

5 Q. And would decisions to file applications for
6 federal registrations of trademark have been part of
7 Ms. McDonald's responsibilities?

8 A. Yes.

9 Q. The next question I'm asking you is in your Rule
10 30(b)(6) capacity as -- as actually all the other
11 questions are -- what were the reasons for filing the
12 application that's been marked as Exhibit 9? And I am
13 not inquiring as to any advice from counsel.

14 A. The Brinkmann trademark came up for renewal. And
15 at that time --

16 MR. COOPER: Excuse me for interrupting. You
17 said the Brinkmann trademark came up for renewal. You're
18 referring to the registration number 1153730 marked as
19 Exhibit 6?

20 THE WITNESS: Yes.

21 MR. CLARK: I'm sorry. Go ahead.

22 A. Okay. It came up for renewal, and we were just --
23 we decided to file in -- in all the classes that we were
24 using the mark.

25 Q. (BY MR. COOPER) So you didn't think that

1 Exhibit 6 provided sufficient reg- -- sufficient coverage
2 in terms of products?

3 A. Exhibit 6?

4 Q. Exhibit 6 is the registration that came up for
5 renewal.

6 A. Okay. That trademark?

7 Q. Yes.

8 A. Okay. Well, I think we realized at that point,
9 that it didn't cover all of our products, and therefore
10 we decided to file in all the classes that would cover
11 our products.

12 Q. Okay. Do you know if Ms. McDonald consulted with
13 counsel? And that's -- I'm not asking for the substance
14 of the consultation, but whether or not she had any
15 discussions with counsel about filing a new application?

16 A. Oh, I'm sure she did.

17 Q. And would that have been Mr. Clark?

18 A. Yes.

19 Q. Do you know whether any opinion was rendered by
20 Mr. Clark or any other attorney regarding the filing of
21 the application that has been marked as Exhibit 9?

22 MR. CLARK: And let me ask for clarification.
23 Are you referring to a formal written opinion?

24 MR. COOPER:: Either written or verbal, but
25 let's --